THE ONTARIO HUMAN RIGHTS CODE,

R.S.O. 1970, Chapter 318, as amended

IN THE MATTER OF the complaint made by Mr. David James Bone of London, Ontario, alleging discrimination in employment by The Hamilton Tiger-Cats Football Club Limited, P.O. Box 172, Hamilton, Ontario.

A HEARING BEFORE: Professor John D. McCamus
Appointed a Board of Inquiry into the above matter by the Minister of Labour, The Hon. Robert Elgie, to hear and decide the above-mentioned complaint.

Appearances:

Mr. J. Sopinka Mr. J. Judge	Counsel for the Ontario Human Rights Commission and Mr. David James Bone
Mr. J. Whiteside	Counsel for the Hamilton Tiger-Cats Football Club Limited
Mr. J. Jaskula Mr. J. Andrew	Counsel for Mr. Tom Dimitroff

Hearings:

Toronto, Ontario, June 26th, July 10th, 11th, 12th and 17th, 1979.

I. Introduction

This Board of Inquiry has been established by the Minister of Labour of the Government of Ontario pursuant to section 14(a) of the Ontario Human Rights Code, R.S.O. 1970, c. 318 as amended (the "Ontario Human Rights Code") to inquire into a complaint filed with the Ontario Human Rights Commission by Mr. David James Bone of London, Ontario ("Jamie Bone") alleging that he has been discriminated against with respect to an employment opportunity by the Hamilton Tiger-Cats Football Club Ltd. of Hamilton, Ontario (the Hamilton Club) which is, as is well known, one of the seven member teams of the Canadian Football League (the "CFL"). In his complaint, Mr. Bone made the following allegations:

> I am a Canadian and have reason to believe that I was refused the position of quarterback, denied training, made victim to the maintenance of an employment classification or category that by its operation excluded me from employment or continued employment, and discriminated against [me] with regard to the terms and conditions of employment because of my nationality and place of origin, in contravention of the Ontario Human Rights Code, section 4(1)(b), 4(1)(e), 4(1)(g), ...

The complaint further alleges that the acts which were said to amount to discrimination in contravention of the Code were undertaken by Mr. Bob Shaw and Mr. Tom Dimitroff, who were respectively, at the material times, the General Manager and Head Coach of the Hamilton Club.

It was not disputed at the Inquiry that the actions of these two individuals would, if they amounted to contravention of the Ontario Human Rights Code, render the Hamilton Club liable for failure to comply with the Code.

In accord with section 14(b)(1) of the Ontario Human Rights Code, the Ontario Human Rights Commission has appeared before this Board of Inquiry and has undertaken carriage of the complaint on behalf of Mr. Bone. Although both Mr. Shaw and Mr. Dimitroff were considered by this Board to be proper parties to this proceeding, as a result of the fact that they are persons named in the complaint with the apparent purpose of suggesting that they had engaged in conduct which amounts to a contravention of the Code, it is only from the Hamilton Club that the Commission and Mr. Bone seek redress.

As the evidence unfolded at this Inquiry, it became apparent that the central issue on which Mr. Bone's complaint rests is whether he was effectively denied a fair opportunity to demonstrate his skills as a candidate for the quarterback position during the Club's 1978 training camp. Mr. Bone's allegations, in essence, are that he was denied such an opportunity by reason of the fact that he was pre-judged by the Head Coach, Mr. Dimitroff, to be less capable than American candidates for the position by reason of the fact that he is a Canadian or, alternatively, that he was denied this opportunity because it was the view of the Club, acting through Mr. Dimitroff, that the CFL.rule, known as the "Designated Import Rule", offered an incentive for appointing American rather than Canadian candidates to the quarterback position.

Prior to giving an account of the incidents which occurred before and during the 1978 Hamilton training camp, it is necessary to engage in a rather extensive examination of the legal and factual background in order to provide a setting in which these events can properly be assessed against the standards of conduct imposed by the Ontario Human Rights Code.

Subsequent sections of this decision will consider the following matters:

- the pertinent provisions of the Ontario Human Rights Code and the nature of the concept of "discrimination" which defines their coverage

- a brief account of the role played by the "training camp" in the operations of a CFL Club and its relationship to the CFL roster rules and the CFL standard player contract under which candidates for positions on CFL teams attend training camps

- an account of the operation of the CFL "import" rules and, in particular, the "Designated Import Rule" and an assessment of the possible implications of the latter with respect to the allegations here made against the Hamilton Club

- an account of Mr. Bone's football career

- an assessment of the evidence led at this Inquiry relating to the events prior to and during the 1978 training camp and a consideration of whether this evidence supports the allegations made by the complainant and the Commission

Before turning to a consideration of these matters, however, one preliminary point concerning the evidence led at this Inquiry should be made. Mr. Sopinka, acting on behalf of the Commission and Mr. Bone, made submissions to the Board to the general effect that the incidents in dispute here must be viewed in the context of what was alleged to be a widespread phenomenon of discriminatory conduct on the part of the senior management of the CFL member clubs. A number of witnesses were produced by the Commission, who offered testimony in support of this allegation. Apart from Mr. Bone, seven additional witnesses, all of them Canadian, made statements in support of this view. Six of these were present or former members of CFL football teams, two of whom are now head coaches at Canadian universities. The seventh was a head coach at another Canadian university who had no playing career in the CFL.

A number of explanations were offered for these alleged practices. Some witnesses focussed their concern on the issue of equality of

opportunity for Canadian quarterbacks and suggested that the Designated Import Rule played a large role in explaining why it was that very few quarterbacks of Canadian origin play for CFL teams. Other witnesses suggested that the problem was a more general one than this. Some were of the view that the attitudes of bias concerning the abilities of Canadian players are a significant factor in creating an environment in which the prospects of an impartial assessment of Canadian CFL recruits are considerably reduced. It was said that most if not all of the CFL head coaches and general managers are American and that they accordingly have a disposition to rely on American credentials with which they are more familiar and to rely on the recommendations of American college football coaches with whom they have greater contact. Some witnesses suggested that CFL coaches simply operate on the basis of an assumption that American football players are better than Canadian. It was suggested that American players are treated more deferentially by coaches and given more coaching attention with the result that this alleged bias becomes a self-fulfilling prophecy. It was also suggested that the alleged preference for the hiring of successful American college football players is, in effect, a response to a market pressure. The presence of American "stars" on a team is likely to "sell more season tickets". This latter point, if it is a telling one, may offer an explanation for the remark of one witness, Dr. Cosentino, that "We shouldn't blame the Americans, we should blame ourselves".

It was intended, apparently, that this evidence would provide some basis against which the origins and possible effects of the Designated Import Rule might be assessed and that it might provide a context within

which the events of the 1978 Hamilton Training Camp could be viewed. I wish to make it perfectly clear, however, that a case for drawing the conclusion that discriminatory attitudes of this kind are a widespread phenomenon amongst CFL coaches and general managers has not, in my view, been made out. However sincere the testimony of these witnesses may have been, much of their testimony related to matters on which further evidence would, in my view, be a necessary pre-requisite to the drawing of conclusions. Thus, many of the allegations relate to the attitude of individuals, both named and unnamed, who are not parties before this Board of Inquiry and who had no opportunity to respond to them. For this reason alone, I would be most reluctant to reach a conclusion that these allegations are soundly based. The important point for present purposes, however, is that this evidence ultimately did not prove to be illuminating with respect to the proper and exclusive concern of this Board of Inquiry: the events of 1978 relating to the relationship between Mr. Bone and the Hamilton Club.

II. The Ontario Human Rights Code and the Concept of Discrimination

The specific provisions of the Code which the Commission and Mr. Bone alleged have been breached by the Hamilton Club are the following:

> 4. (1) No person shall, . . .
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> (b) dismiss or refuse to employ or to continue to employ any person;
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> (c) refuse to train, promote or transfer an employee;
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> . . .

> (e) establish or maintain any employment classification or category that by its description or operation excludes any person from employment or continued employment;
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> . . .
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> (g) discriminate against any employee with regard to any term or condition of employment,
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> because of race, creed, colour, age, sex, marital status, nationality, ancestry, or place of origin of such person or employee.

It should be further noted that the Code does not appear to admit of the possibility that nationality or place of origin could be a bona fide occupational qualification. Sub-section 6 of section 4 reads as follows:

> (6) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on age, sex or marital status do not apply where age, sex or marital status is a bona fide occupational qualification and requirements for the position or employment.

Sub-section 7 of section 4 does stipulate that the prohibited grounds set out in section 1, including nationality and place of origin, can be bona fide occupational qualifications if the employer is, "an exclusively religious, philanthropic, educational, fraternal or social organization that is not operated for private profit" or an "operation that is operated primarily to foster the welfare of a religious or ethnic group and that is not operated for private profit." The Hamilton Club is, of course, a professional football club and is operated for, amongst other purposes perhaps, the purpose of making a profit for its owners.

As is evident from the very terms of the statute, the enactment of the Ontario Human Rights Code represents a deep and profound commitment

to the dignity of the individual and the right of the individual to be free from forms of discriminatory conduct which offend that dignity. The preamble to the Code includes the following statements:

> Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
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> And whereas it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place or origin;

It may be that a major preoccupation of those who enacted the Code was a desire to eradicate discrimination against members of minority groups in our society. It might well come as a surprise, then, that ultimately a native-born Canadian would perceive a need to invoke the assistance of the Code in order to protect an opportunity for employment. There can be no doubt, however, that if Mr. Bone's allegations are supported by the evidence led at this Inquiry, he is fully entitled to call in aid the provisions of the Code.

Before turning to consider the specific factual circumstances of this case, it will be useful to set out, in a general way, a number of considerations relating to the interpretation of the provisions of the Code on which the complainant relies.

First, attention must be addressed to the question of defining the type of conduct which is proscribed by the Code. In essence, the Code prohibits, in these sections, any person from engaging in "discrimination" based on the enumerated criteria which include, of course, nationality and place of origin in making employment decisions. Although the actual word "discriminate" is only specifically employed in sub-paragraph (g) of Section 4(1), it is clear that when the Code directs, for example, in

sub-paragraph (b) that no person shall "refuse to employ...any person" because of "race, creed, colour...nationality...or place or origin", the Code is attempting to eradicate the phenomenon commonly referred to as "discrimination."

Although the meaning of the concept of "discrimination" in this context may be so well understood as not to require elaboration, it will be useful to examine briefly the possible application of this concept to the rather unusual facts of this case - an allegation of discrimination against a member of the group, i.e. Canadian national, whom one would not normally think of as possible targets for "discrimination". The essence of the concept, I would suggest, is the act of "stereotyping", by which I mean the making of judgments about people on the basis of their membership in a particular group rather than on the basis of their individual merit. An American judge has expressed the point in similar terms:

> 'Discrimination' means the act of making a distinction in favour of or against a person or thing based on the group, class or category to which that person or thing belongs rather than on individual merit.

See Courtney v. The National Cash Register (1970), 262 N.E. 2d 586 (Ohio). In seeking to eliminate discrimination, in this sense, as it pertains to the employment context, the evident purpose of the Code is to ensure equality of opportunity and eliminate unjust barriers to employment based on the prohibited grounds of discrimination.

An obvious illustration of conduct which would amount to discrimination in the requisite sense would be for an employer to act on the basis of a straightforward rule that he would not employ anyone of a particular national group. A variety of considerations, however misguided, might underlie such

conduct. The employer might be acting on the basis of personal animus or hostility to the group in question. Or it may be that the employer has reached a conclusion, based perhaps on previous contact with members of that national group, that they are not likely to perform effectively as employees for him. He might have assumed, for example, that the members of a particular group are less industrious or less intelligent or less pleasant in their personal dealings than people who are not members of that group. Whatever the reason for the employer's decision to refuse to employ members of the particular national group, however, the employer is engaging in a prohibited act. He would be making employment decisions on the basis of a stereotyped assessment of a group of people and would be refusing to assess individuals, as he must, on the basis of their individual merit. Conduct of this kind is "discrimination" in its most usual sense. This primary meaning of the concept of "discrimination" will be referred to here as "direct" or "intentional" discrimination and it will be distinguished from a secondary meaning of the concept which I will refer to as "indirect" discrimination.

In the context of the present case, it may be particularly useful to emphasize that the notion of direct discrimination is not precisely co-extensive with attitudes which might be referred to as "bigotry" or "irrational hatred" or "dislike" of a particular group. One might engage in stereotyping which amounts to a contravention of the Code without feeling any personal animus or hostility toward members of the group as a general matter, or toward the particular individual who is subject to the stereotyped judgment. Thus, one might profess or indeed feel a great affection for Canadians in general but refuse to employ them on the assumption that they share, as a general matter, some undesirable characteristic which would render them less capable than others for the particular job in question. Discrimination

on the basis of sex may provide a more obvious illustration. It may be that there are employers who refuse to hire women for certain jobs on the basis of stereotyped attitudes towards the capacities of women in general, even though no particular emnity is felt towards women in general or toward any particular candidate for employment by the employer in question. To act on the basis of such attitudes, rather than on the basis of merit, is to engage in what I have termed "direct" or "intentional" discrimination and clearly, in my view, would amount to a contravention of Section 4 of the Code.

In the present case, I might add, the evidence does not suggest the existence of "direct discrimination" in the sense of bigotry or irrational dislike of Canadians on the part of the responsible officers of the Hamilton Club. Rather, if direct discrimination did occur in this case, it would appear to have been based either on stereotyped attitudes with respect to the abilities of Canadian football players or, alternatively, through the application of a CFL rule, the "Designated Import Rule", which is alleged to create a barrier against the appointment of Canadian quarterbacks to CFL Clubs.

There is, however, a secondary concept of "discrimination" which is, I believe, also prohibited by the Code and which may be relevant in the circumstances of this case. Here I refer to "indirect" discrimination or discrimination by "consequences". This is a concept which has been articulated by what is now a voluminous body of American caselaw interpreting provisions of Title VII of the U.S. Civil Rights Act of 1964 which are very similar in their wording and apparent purpose to Section 4 of the Ontario Human Rights Code. Section 703(a) of the U.S. Act provides:

> It shall be an unlawful employment practice for an employer
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> (1) to fail or to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin.

In interpreting this provision, the American courts have addressed the question of whether the imposition of requirements for employment, such as the attainment of certain educational qualifications or the passing of aptitude or I.Q. tests, which have the effect of excluding from employment opportunities an unequal proportion of members of a particular group, amounts to a discriminatory act within the meaning of this provision. Such tests may appear to be "neutral" in their design inasmuch as they are applied evenhandedly to all applicants for employment. Nonetheless, such tests may have the consequence of excluding a higher proportion of the members of a group protected by the Act from discrimination. Where this is so, the difficult point of interpretation which arises is whether the Act prohibits only conduct which is intended to discriminate against members of a particular group - what I have referred to above as "direct discrimination" - or extends to cover, as well, conduct which unintentionally has the consequence of prejudicing the opportunities for employment of the members of a particular group. In the leading case on this point, the decision of the Supreme Court of the United States in Griggs v. Duke Power Co. (1971) 91 S. Ct. 849, it was clearly established that it is not necessary to find the existence of intention to discriminate in order to determine that conduct which had the effect of discrimination is a contravention of Section 703(a) of the Civil Rights Act. Chief Justice

Burger, speaking on behalf of the Court, said the following:

> ...good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.

In the Griggs case, the conduct of the employer in question involved a requirement that candidates for employment either possess a high school education or pass a standardised general intelligence test as a condition of employment. This requirement was alleged to have the effect of disqualifying black applicants at a substantially higher rate than white applicants. The Court held that even though no intention to discriminate was shown, such conduct contravened Section 703(a) unless the employer could establish what is now generally referred to as the "business necessity" defence.

The interpretation rendered in Griggs has been employed in a substantial number of American judicial decisions to attack a wide range of apparently neutral job qualifications which have been shown to have discriminatory consequences. To choose but one example, in Mieth and Rawlinson v. Dothard (1976),418 F. Supp. 1169, a U.S. District Court held that reliance on certain height and weight requirements for applicants for the position of state trooper amounted to a contravention of the Act inasmuch as they had a discriminatory effect on female applicants. For further illustrations, see Albermarle Paper Co. v. Moody (1975), 422 U.S. 407; United States v. Georgia Power Co. (1973), 474 F. (2d) 906; United States v. N.L. Industries Inc. (1973), 479 F. (2d) 354; Head v. Timken Roller Bearing Co. (1973), 46 F. (2d) 870; Johnson v. Goodyear Tire & Rubber Co. (1974), 491 F. (2d) 1364; Tettway v. American Cast Iron Pipe Co. (1974), 494 F. (2d) 211; Davis v. Washington (1975) 512 F. (2d) 956; Green v. Missouri Pacific Railroad Co. (1975),523 F. (2d) 1290; Watkins v.

Scott Paper Co. (1976), 530 F. (2d) 1159; United States v. City of Chicago (1977), 549 F. (2d) 415; Davis v. County of Los Angeles (1977), 566 F. (2d) 1334; Parson v. Kaiser Aluminum and Chemical Corp. (1978), 575 F. (2d) 1374. The Griggs line of authority has also attracted a substantial and favourable commentary in the American legal periodical literature. See, for example, Blumrosen,"Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination"(1972) 71 Mich. L. Rev. 59.

The Griggs line of authority does permit an employer to establish as a defence that the requirement in question is imposed on candidates for employment as a matter of "business necessity." No purpose will be served here by exploring in detail the evolution of the various lines of authority which have attempted to define this defence. They are usefully summarised in a law review article, "Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach", (1974) 84 Yale Law Journal 98. Suffice it to say that the defence can only be established if the employer can establish that the utility of the test for his purposes is sufficiently compelling to override a discriminatory impact or, alternatively, can establish that the requirement furthers a legitimate business purpose and that there is no alternate practice possible which would serve this purpose equally well and have a less discriminatory effect. It would not be sufficient for the employer to establish merely that the requirement in question was a convenient device for screening applicants.

The problem considered in the Griggs line of authority appears not to have been addressed in a reported Canadian judicial decision interpreting equivalent provisions of the federal or porvincial Human Rights Codes. In Re Attorney General for Alberta and Gares (1976), 67 D.L.R. (3d) 635, Mr. Justice McDonald of the Alberta Supreme Court dealt with an analagous

problem in interpreting somewhat similar provisions of the Alberta Individual Rights Protection Act, (1972) S.A., 2. The problem in the Gares case involved a complaint with respect to unequal wages based on sex. The Alberta Act provides in Section 5(1) that:

> No employer shall
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> (a) employ a female employee for any work at a rate of pay that is less than the rate of pay at which a male employee is employed by that employer for similar or substantially similar work.

The employer hospital had been charged with discrimination on the grounds that the collective agreement which it had negotiated with male orderlies provided for a higher wage level than did the collective agreement negotiated with female nurses' aids, even though the repsective responsibilities of these two groups were roughly similar. The two groups were in different bargaining units and had separately negotiated their agreements with the hospital. The hospital accordingly argued that the fact of separate bargaining processes substantiated its claim that no discriminatory effect was intended. McDonald, J. held that the complaint was justified, notwithstanding the absence of intent to discriminate, because (at p. 695) "it is the discriminatory result which is prohibited and not a discriminatory intent." It must be noted, however, that Section 5(1) is perhaps more clearly directed at discriminatory consequences than Section 4 of the Ontario Human Rights Code.

Were I required to reach an opinion as to whether the Griggs line of authority offers an analysis which should be applied in interpreting Section 4 of the Ontario Human Rights Code, I would conclude that it does so. In my view, the rationale underlying the Griggs case law is compelling. Provisions such as Section 4 of the Ontario Human Rights Code are not attempts to control the thought processes of employers. They are designed, rather,

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I would suggest, to strike down conduct which has the discriminatory effect of denying equal employment opportunity to members of groups identified by the prohibited grounds of discrimination. It would be cold comfort to an individual whose opportunity for employment has been precluded by the imposition of a discriminatory requirement to be advised that the requirement must stand as the effect was unintentional. Further, if the Code were interpreted so as to require proof of deliberate intent to discriminate, biased individuals could easily conceal their bias under the guise of "neutral" employment requirements and thus evade the Code's prohibitions. As remedial legislation of a humanitarian character, the Ontario Human Rights Code seems especially deserving of that "fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit" which is specifically directed by Section 10 of The Interpretation Act, R.S.O. 1970 c. 225.

It follows, then, that the conduct of the Hamilton Club to be reviewed in the course of this decision may be measured against the standard of indirect discrimination as well as the standard of direct discrimination or "stereotyping" which has been indicated above.

One further point of a general nature should also be considered. Section 4 of the Code provides that no person shall discriminate "<u>because</u> of...nationality...or place of origin." It may be asked whether the use of the term "because" here suggests that the prohibited criterion must be the sole and exclusive basis for the discriminatory decision if a contravention of the Code is to be established. It is my view that it would be sufficient, for purposes of establishing a contravention, to prove that the prohibited criterion was merely one amongst a number of factors taken into account

by the employer in making a decision with respect to the employee. Support for this view may be drawn from two recent cases interpreting a provision of the Canada Labour Code, R.S.C. 1970, C.L-1, which is roughly analogous to the structure of Section 4 of the Human Rights Code with respect to this point. Section 101 of the Labour Code provides as follows:

> (3) No employer, and no person acting on behalf of an employer, shall
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> (a) refuse to employ or to continue to employ any person or otherwise discriminate against any person in regard to employment or any term or condition of employment because the person is a member of a trade union, or....(emphasis added)

In Sheehan v. Upper Lakes Shipping Ltd. and the Canada Labour Relations Board [1978] 1 F.C. 836, the Federal Court of Appeal held that a contravention of this revision would be established if the prohibited considerations were shown to be one of the motivating factors leading to a refusal to employ. In Sheehan, the Court quoted with approval passages from a similar decision of the Ontario Court of Appeal in R.V. Bushnell Communications Ltd. (1974) 1 O.R. (2d) 442 which offered a similar interpretation of yet another provision of the Labour Code similar in structure to Section 1(10).

III. Training Camp, The CFL Roster Rules, and the Standard Player Contract

The specific events which are alleged to support the complainant's allegations of discrimination are more easily comprehended if attention is first turned to the general background of the CFL rules and the contractual arrangements under which a CFL training camp operates.

Typically, the CFL clubs commence their training camps towards the end of May in any particular year. The 1978 Hamilton camp, for example, opened on Saturday, May 27th. Apart from performing the obvious function of

providing an opportunity to engage in training activity, the camps also provide an opportunity for each club to assess the abilities of various candidates for positions on each team and make a selection of the candidates who appear to be the most likely to perform well during the regular season. The CFL rules set an express limit on the number of players who are allowed to serve as members of the club's roster during the regular season. Paragraph 9 of Section 8 of the CFL By-laws stipulates that "A member Club shall be permitted to dress for a scheduled or play-off game or Championship Game a maximum of 33 players, of whom not more than 15 may be imports." Additionally, there are arrangements under which players can be removed from the regular roster and placed on a so-called "Injured Players List" but the active roster is strictly limited to thirty-three players. During the pre-season training camp, then, each Club must identify the thirty-three players who are to serve on the initial player roster with which it will commence the regular season of play.

Although I was not made aware of any limit on the number of players that could be invited to a Club's training camp, there appear to be practical limitations on the number of players who can be seriously assessed during this period of time. In 1978, the CFL stipulated that the final selection of thirty-three players would have to be made by July 6th, a mere five weeks or so after the opening of the Hamilton Camp. Indeed, a schedule of interim reductions prior to that date was ordered by the League. In the particular case of the Hamilton Club, the Club was required to reduce its player roster to fifty players by June 12th, to forty-five players by June 22nd, and to forty-two players by June 30th. There is thus an obvious need to make relatively quick judgments about the capacity of candidates attending the

training camp in order to comply with this schedule. In the particular case of the Hamilton Club in 1978, the evidence led at the hearing indicated that approximately 70 players were invited to the camp and there was thus a requirement to identify the first twenty candidates to be rejected within two weeks of the commencement of the camp.

Although the number of players on the active roster thus cannot exceed thirty-three, there may be considerable change through the season in the identity of the players who make up the active roster. There may be some movement back and forth from the active roster to the Injured Players List as the players sustain injury or recover therefrom. As well, a Club may decide that it is advantageous to recruit replacements for various members of its roster. In order to facilitate recruitment of new players, member Clubs are permitted to allow a player not on its active roster to practice with the Club for a "five-day trial." The provisions under which "five-day trials" are permitted are carefully drawn so as to ensure that they do not become a device for informally expanding the Club's roster. Thus, paragraph 15 of Section 8 of the By-laws (filed as Exhibit 1) provides:

> 15. A member Club may, subsequent to its first scheduled game, permit a player not on its current roster to participate in its practice sessions for a period of not more than five consecutive days not including,
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> (a) the day preceding the game,
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> (b) the day of a game, or
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> (c) the day following a game,
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> provided that the Commissioner is notified as of the first day of the trial period, in which case the Club shall retain exclusive rights to the player until a conclusion of said trial period. At the conclusion of said trial period the player, unless signed by the Club, shall not be permitted to participate further in the Club's practice sessions. Such player shall not be eligible for a second five-day trial with said

> Club unless subsequent to the first trial period he has joined another member Club for a similar trial period or has signed a contract with a member Club and has been deleted from its roster.

19.

Member Clubs are encouraged to abide by these arrangements by the imposition, under paragraph 18 of Section 8, of sanctions against Clubs which permit players other than those on the regular roster or the Injured Players List or in the proper five-day trial to attend a practice session. Paragraph 18 directs the League Commissioner to fine the Club in question a minimum of $500 per practice session for breach of the rules. At the discretion of the Commissioner, the fine may be raised up to $1,000 for each session attended by such a player. These arrangements serve to emphasize the point which one might otherwise have assumed in any event that the pre-season period is obviously the most critical time in which the Club must assess its personnel needs and make the majority of its important recruitment decisions.

For this reason, each Club has an obvious interest in inviting to the pre-season camp only serious candidates for positions on the team. To this end, the Clubs apparently engage in elaborate scouting and recruitment techniques, only hinted at in the evidence before this Inquiry, in order to identify players worthy of consideration at the pre-season training camp. Before a player can attend a CFL training camp, he must enter into a contractual relationship with the Club in question. The general form of this agreement and many of its provisions are set out in the "Standard Player Contract" which the CFL rules require each Club to use as the basis of the contracts of employment which it enters into with its players. As might be expected, the unusual nature of this type of employment results in some unusual features of this contract, not the least of which is that a player is not entitled any remuneration under its standard terms unless and

until he plays in regular season games for the Club. All but 5% of the total salary is divided into equal installments payable after each regular League game; the remaining 5% is paid at the end of the season. Individual players may, however, successfully negotiate a "signing bonus" payable at the time the contract is first executed. The player may retain the bonus payment even if ultimately he is not placed on the Club's roster for the season.

The Standard Player Contract also secures to the Club a unilateral right to terminate the contract "if, in the opinion of the Head Coach, the Player fails at any time during the term of this contract to demonstrate sufficient skill and capacity to play football of the calibre required by the Conference or by the Club or if, in the opinion of the Head Coach, the Player's work or conduct in the performance of this contract is unsatisfactory, or, where there exists a limit to the number permitted of a certain class of player and in the opinion of the Head Coach, the Player, being within that class, should not be included amongst the permitted number..." Although the right to terminate the contract of employment is thus clearly reserved to the Club, it should be noted that the Club's right to do so is limited by this provision to situations in which the Head Coach has reached an opinion, presumably in good faith, that the player's performance is inadequate in the degree specified by this provision, or where the Head Coach has reached the conclusion, again in good faith, that the player is in a certain class of player which has a numerical limit and that the particular player in question ought not to be included within the permitted number. With specific reference to Mr. Bone's situation, it should be noted that he is not a member of a player class and which has a numerical limit and accordingly, the right of the Hamilton Club

to terminate his contract would be circumscribed by the requirement that an opinion be reached by the Head Coach that his performance was satisfactory.

In summary, then, the training camp is a period of intense assessment on the part of the Head Coach as he, together with his coaching staff, attempts to put together a team which will be able to perform successfully in the regular season and to make these assessments in accord with the requirements of the CFL roster rules. Players who attend the camp must be under contract and the contract is one which permits, subject to restrictions indicated above, the Club to unilaterally terminate the contractual relationship with the player. Signing such a contract is thus no guarantee of employment. Indeed, in the absence of a signing bonus, it is no guarantee of any remuneration whatsoever. In the case of the 1978 Hamilton camp, slightly less than half of the players who attended the camp would ultimately be placed on the opening roster for the season.

IV. The Import Rules and, in particular, The Designated Import Rule

As indicated above, it has been alleged by the Commission and Mr. Bone that the operation of the "Designated Import" Rule has played a role in inducing Mr. Dimitroff to act in contravention of the Human Rights Code.

In order to assess this argument, it will be necessary to set forth, in some detail, an analysis of the Designated Import Rule and an account of the context in which it has arisen.

The Import Rules of the Canadian Football League are the evident result of an attempt made by the League to effect a resolution between two apparently - or so it is thought - conflicting objectives which have implications for

the composition of the playing rosters of the Member Clubs. First, it is clear that the Clubs wish to preserve a strong Canadian identity in their football teams by ensuring that there are a substantial number of Canadian players on each team. At the same time, the Member Clubs apparently feel that the participation of a substantial number of American football players is desirable for the purpose of enhancing each Club's playing capacities in the hope that this might stimulate or sustain public interest in attending League games. Thus, there is some pressure to increase the number of American players permitted on each roster. Evidence as to the history of the CFL Import Rules, was given at the Inquiry by Dr. Frank Cosentino a former CFL quarterback, now Chairman of the Department of Physical Education of York University and Head Coach of the University's football team. Dr. Cosentino has made the concept of professionalism in Canadian sport a subject of study. As described by Dr. Cosentino, the evolution of the CFL import rules reveals a series of attempts at compromising the two objectives of ensuring a Canadian identity to the League while, at the same time, permitting substantial employment of American players. Over the years, then, the number of American players on each Club's roster has been permitted to increase, but the Rules have evolved in such a way as to indicate a continuing desire to preserve a substantial Canadian contingent on each team. This process of evolution ultimately culminated in the adoption in 1970 of amendments to the Rules which brought in the Designated Import Rule which is the subject of controversy in the present case.

Dr. Cosentino indicated in his evidence that the period of major change in the Import Rules occurred in the decade following

1960. There has been a steady increase in the number of imported players permitted on each Club from 1960, when approximately eight or nine players were permitted, to the maximum of fifteen permitted under the 1970 revisions which are currently in force. Obviously, the pressure to increase the number of American players on each Club's roster has had a substantial impact on the current shape of the Rules. And yet, the counter objective of preserving the Canadian identity of the teams has also had an influence in the deliberations of the League. Two manifestations of this are of particular interest here. First, the shifting of the rules from a definition based baldly on citizenship to one which distinguishes between "import" and "non-import" players indicates, in part, a desire to ensure substantial participation by individuals who are, in some sense, "real" Canadians. Secondly, the introduction of the rather curiously structured Designated Import Rule in 1970 suggests that the apparent desire of Member Clubs to have an additional import player was tempered by a desire to not permit full status to the fifteenth import member of each team. It will be useful to consider briefly each of these developments in turn.

Dr. Cosentino testified that up until 1965, the CFL Rules placed a limit on the number of "Americans" permitted to play on each Member Club's roster. In 1965, however, it was felt that some solution had to be found to what Dr. Cosentino referred to as the "naturalized Canadian problem". The naturalized Canadian problem, in short, was that American players who had been resident in Canada for the requisite number of years were applying to become Canadian citizens and would thus no longer be counted as Americans under the CFL roster rules. The perceived problem with this development, of course, was that

increasing numbers of players on the team would be of American origin, would be products of the American college system and, notwithstanding their newly acquired Canadian citizenship, might therefore be considered to reduce the homegrown flavour of the football teams to an unacceptable degree. Accordingly, the CFL decided that it would set a limit of three on the number of naturalized Canadians each team would be allowed to place on its roster. This move, according to Dr. Cosentino, led to a dispute with the CFL Players Association and indeed, there was some suggestion that a complaint might be brought against the League under the Ontario Human Rights Code.

The CFL attempted to resolve these difficulties by re-defining what had formerly been the explicitly American quota into a quota for "import" players, whose status was to be determined in accord with a formula which stressed "place of training" rather than citizenship or nationality. The shift to this new concept had the obvious virtue of precluding American citizens who played football in the CFL and then became naturalized Canadian citizens from losing their "import" status. Once an "import", always an "import". Further, a rule based on criteria rooted in place of training rather than citizenship created the illusion, if not the substance, of a rule which did not discriminate with respect to employment opportunities on grounds of nationality.

In their present form the rules which define "import" and "non-import" status are to be found in paragraphs 10 and 11 of Section 8 of the CFL By-laws in the following terms:

> 10. The following players shall be classified as import players:

25.

(a) A player who has received training in football outside Canada by having participated as a player in a football game outside of Canada prior to his seventeenth birthday.

(b) A player who has received training in football outside of Canada by having participated in a football game as a player outside of Canada after his seventeenth birthday, but who has received no football training in Canada prior to his seventeenth birthday.

11. The following players shall be classified as non-import players:

(a) A player other than one referred to in paragraph 10.

(b) A player who has received the training in football outside of Canada as described in paragraph 10, but who was classified as a non-import prior to July 31, 1965.

(c) A player who has received the training in football outside of Canada as described in paragraph 10, but who, prior to July 31st, 1965, had qualified as a non-import under the By-Laws in effect prior to February 1st, 1965.

(d) A player who has qualified as a non-import under the provisions of paragraph 10(b) (IV) of Section 8 of the By-Laws as revised and amended to June 15th, 1967.

(e) A player who was physically resident in Canada for an aggregate period of seventeen years prior to his attaining the age of twenty-one years.

The Rules, as can plainly be seen, have been rather artfully drafted. We may ignore sub-paragraphs (b), (c) and (d) of paragraph 11 which simply preserve the status quo with respect to those players, presumably American, who have already achieved "non-import" status. The heart of the scheme

is set forth in sub-paragraphs (a) and (b) of paragraph 10 and (a) and (e) of 11. Though these rules are apparently based on "place of training", it is to be observed that the place of training which is critical is that where the individual receives his first football training prior to the age of seventeen. Through this device, the rules effectively classify individuals on the basis of their national origin. The Rules thus do not deem all players who have received their football training at an American college to be "imports". Such a rule, after all, would classify as "imports" all Canadians who learned their football as students at American colleges. Further, it will be to no avail for an American who might wish to acquire "non-import" status to spend some or, indeed, all of his college career playing football for a Canadian college team. An American youngster who plays football in the United States prior to the age of seventeen is indelibly stamped as an "import" under these rules. Should a Canadian youngster be so unfortuante as to play football in the United States prior to his seventeenth birthday, he will be saved from being classified as an "import" by paragraph 11(e) as long as at least seventeen of the years prior to his attaining the age of twenty-one are spent as a Canadian resident. Thus, although he might receive virtually all of his training at American high schools and colleges, the "non-import" status would not be lost. It is thus no surprise that the witnesses who testified at this Inquiry indicated that almost without exception the import players are of American origin and the non-imports are almost invariably of Canadian origin.

The import rules thus appear to represent a rather sophisticated device for preserving a minimum number of players of Canadian origin on each CFL team.

The "Designated Import" Rules add a further gloss to this scheme which, again, appears to reflect a desire to resist, in some limited measure, further

Americanization of the Member Club teams. Prior to the introduction of the Designated Import Rules in 1970, each Club was permitted fourteen imports on its roster. The 1970 revisions permitted an additional fifteenth import but stipulated that this import must be "designated" in either one of two ways. If designated under the first branch of the rule, the fifteenth import would be allowed to substitute for another import during a game with the result, however, that the player whom he replaces may not play again during that game. Under the second branch of this rule, however, a special arrangement was devised for the quarterback position. If two import players are designated as quarterbacks, they are permitted to freely substitute for each other during the game. The precise wording of the rule is set out in paragraph 9 of Section 8 of the By-laws as follows:

> 9. A member Club shall be permitted to dress for a scheduled or playoff game or Championship Game a maximum of 33 players, of whom not more than 15 may be imports. When 15 import players are so dressed a Club shall, prior to the game
>
> (a) designate one import player as a substitute who shall be permitted to replace another import player during the game on the understanding that the player he replaces may not re-enter the game, or
>
> (b) designate two import players as quarterbacks who shall be permitted to alternate at any time during the game at the quarterback position exclusively. For the purpose of this paragraph the duties of the quarterback position may include punting, place kicking, kicking off, or holding the ball on convert or field goal attempts. Such a designated quarterback may not enter the game at another position, except under the provisions of sub-paragraph (a) of this paragraph 9.

As previously indicated, it has been submitted on behalf of the Commission and Mr. Bone that the Designated Import Rules have the effect of discriminating against Canadian candidates for the quarterback position. The explanation for this view offered by Mr. Sopinka is the following. ... For obvious reasons, football teams would like to have as large a number of active players dressed for a game as possible. Hence, a CFL football coach naturally wants to be able to fully utilize, if possible, all thirty-three members of his roster during each league game. Full utilization of the roster would imply the ability to freely substitute one player for another as the need arises or as strategy suggests from time to time during the game. Thus, it is an unattractive proposition for a coach to exercise option 9(a) and designate a player other than a quarterback as a Designated Import. If that option is chosen, either the Designated Import or the person for whom he substitutes, is effectively required to sit out the game. If two quarterbacks are designated under 9(b), however, free substitution is permitted and all members of the roster can be fully utilized. Assuming, as Mr. Sopinka argues is the case, that coaches wish to maximize the number of Americans on the roster, it then follows that of the fifteen permitted imports, coaches will prefer to designate two quarterbacks as the Designated Imports. As a result, it is alleged, coaches would assume that the usual complement of two quarterback positions on the roster will be filled by Americans and hence no serious attempt is made to either recruit or thoroughly assess talented Canadian candidates for this position.

These submissions may be assessed on two levels. First, one may ask whether the Rule on its face does, in fact, offer an inducement to coaches

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players being substantially lower than that of American members of the team, there would be savings to be affected by retaining the Canadian candidate. Further, as Mr. Whiteside suggested in argument, it may be that a Canadian candidate would be more likely than an American to wish to make his career in Canada and thus might be less vulnerable than an American to enticements from American football teams.

In short, a careful reading of the Designated Import Rule does not easily yield evidence of a bias inherent in the structure of the Rule itself. None of the witnesses who addressed this question succeeded in persuading me that a decision to prefer an American candidate to a more talented Canadian could be rationally defended in terms of some concrete advantage to be derived under the Designated Import Rule. Nonetheless, each witness, with the possible exception of Mr. Dimitroff, was resolute in the view that some such advantage did exist and that it provided an explanation for the fact that Canadian candidates for the quarterback position do not appear to have much success in the CFL at the present time.

It has not been established in the evidence before this Inquiry that this view is, in fact, shared by all or most of the coaches and general managers of the CFL teams. The only witness who had CFL coaching experience was Mr. Dimitroff himself. Mr. Dimitroff's evidence with respect to his own views will be considered in a later section of this decision. It should be noted, however, that Mr. Dimitroff is no longer employed by a CFL team. The evidence in support of the view that the Designated Import Rule is perceived by CFL management personnel as an incentive to prefer Americans for the quarterback position is of two kinds. First, it was submitted by Mr. Sopinka that the absence of a significant number of Canadians playing in this position in the year since the Designated Import Rule was introduced is some evidence that the Rule is having this effect. If the Canadian quarterback was a rare species prior to 1970, it is allegedly in danger of becoming extinct

be more capable of fulfilling the position. If so, the Designated Import Rule would offer some explanation for what is alleged to be a widespread practice of discrimination against Canadian candidates. Secondly, the effect of the Designated Import Rules might be evaluated on the basis of their practical impact. Regardless of the meaning which would be ascribed to the Rules on a careful reading of them, one may ask whether they are understood by coaches to offer an incentive to prefer import candidates. If so, a further question arises - is this perceived incentive acted on? To put the matter more bluntly, do CFL coaches discriminate against Canadian quarterback candidates because they perceive that it is advantageous to do so because of the Designated Import Rules?

Ultimately, of course, these are questions which must be squarely addressed in the context of the circumstances pertaining to Mr. Bone's try-out in 1978. Nonetheless, it is useful to address these questions, in a preliminary way, from a more general perspective. Curiously, it appears that the Designated Import Rules do not, on their face, offer an incentive for preferring import quarterbacks to more talented Canadians. Nonetheless, there has been evidence introduced at this Inquiry which suggests that there is a widespread belief that the Rules do offer such an incentive and that some football clubs, at least, operate on the assumption that the two quarterback positions should be filled by import quarterbacks in order to take advantage of the Rules. If this is so, of course, it follows that the Rules are perceived to act as a disincentive for recruiting or hiring Canadian candidates for the position.

In order to support the view suggested above that the Designated Import Rules do not, if considered in isolation, offer an incentive for discriminating against a Canadian quarterback candidate, it may be useful to consider briefly a hypothetical question which I put to a number of witnesses

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coach has selected thirteen imports to fill positions other than quarterback. Let us also assume that he is actively considering three candidates for quarterback, two imports and one Canadian and further, assume that the Canadian candidate is more talented than at least one of the imports. In such circumstances, what possible advantage would a coach see in choosing as his second quarterback the less talented import over the Canadian?

If we keep in mind the desirability of full utilization of the roster, it would appear that no benefit is achieved by rejecting the Canadian candidate. As second string quarterback, he could freely substitute for the import first string quarterback. It is true, of course, that choosing the Canadian candidate could have the effect of reducing the number of imports on the roster to fourteen. This could hardly be counted a disadvantage, however, since maintaining 15 imports can only be achieved by keeping a quarterback who is less capable than the Canadian. To prefer the less competent American in these circumstances would be to insist on a complete complement of 15 imports, regardless of talent considerations - a policy which presumably no coach in his own self-interest would want to pursue. And, of course, if the more talented Canadian is hired, the coach then is free to fill another position with a 15th import if he would prefer to have an additional but "substitution-restricted" import rather than a Canadian. Is it not obviously better to have 14 regular imports, the choice of an additional substitution-restricted import and the most competent second quarterback than to have 14 regular imports and one less competent import quarterback?

Further, there may be some advantages to preferring the Canadian candidate. If Mr. Sopinka's submissions on this point are correct, the

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Robinson, a recent player employee of the Ottawa Rough Riders Football Club have testified that the general managers of their respective Clubs made remarks indicating that they viewed the rule to have this effect. As will be seen, Mr. Dimitroff also has made remarks in the past, which he confirmed in his evidence, which offer some support for this view. Inasmuch as it appears, as has been suggested above, that a careful analysis of the Rule suggests that a perception that the Rule offers an incentive to discriminate cannot be rationally defended, it seems improbable that the view is universally or even widely held that the Rule does offer such an incentive. Mr. Sopinka has argued to the contrary, however, and suggests that this perception of the significance of the Rule must be viewed within the context of a more general bias favouring American football players. In Mr. Sopinka's view, it is this general bias which gave birth to the Designated Import Rule in the first place. Inasmuch as it was assumed that CFL quarterbacks would be Americans, special arrangements had been made for the designation of imported quarterbacks. Given this origin, the Rule now rather ironically has the effect of confirming the bias by creating the impression that there are concrete incentives for appointing Americans to this position. In this way, or so it is alleged, the widely accepted view that the Rule offers such incentives is indirect evidence of the existence of a more general bias. However plausible or inplausible one may find this hypothesis, it is my view that there has not been sufficient evidence led before this Board of Inquiry to establish that it corresponds with reality. Again, however, it should be emphasized that the specific concern of this Board of Inquiry relates only to the events surrounding Mr. Bone's relationship with the Hamilton Club in 1978. Accordingly, it is unnecessary and, in view of the slender nature of the evidence which supports this proposition, inappropriate for this Board of Inquiry

to attempt to reach a conclusion as to whether the perception of CFL coaches and general managers of the operation of the Designated Import Rule is such as to render it a barrier to the employment of Canadian quarterbacks.

The fact that the scope of this Inquiry is so narrowly focussed may explain why it was that none of the parties attempted to create a more complete record in the evidence before this Board with respect to this matter. The Commission did not attempt to lead evidence, for example, with respect to general recruitment practices of the CFL teams. Mr. Whiteside, on behalf of the Hamilton Club, indicated that he felt no need to respond to these general allegations of bias as his sole concern was to establish a record relating to the specific events of 1978 which form the basis of the present Complaint. The CFL was not added as a party to the proceeding before this Board as the complaint did not allege that the CFL had acted in contravention of the Code. Further, the CFL did not seek to intervene in these proceedings. As a result, the record before this Board is not sufficient to establish either the conclusion that CFL coaches and general managers act on the basis of a perception that the Designated Import Rule acts as a discentive to the employment of Canadian quarterbacks or that, as a result of this perception, CFL recruiting practices generally and systematically avoid the recruitment of Canadian quarterbacks.

With respect to the facts underlying the specific complaint in issue here, however, there is some evidence that Mr. Dimitroff did, in fact, assume that the Designated Import Rule offer an incentive to the employment of American quarterbacks. This evidence will be reviewed in a later section of this decision. At this point, it is convenient

to consider whether, as a general matter, it would amount to a contravention of the Code to act on the basis of such a perception in evaluating candidates for the quarterback position. The Rule, it will be recalled, rests on a distinction between players who are "imports" and those who are "non-imports". If a coach assummed that the Designated Import Rule offered an incentive to hire "import" quarterbacks and further, if he acted on the basis of that assumption giving preference to "import" candidates, would this amount to a contravention of section 4 of the Code?

Returning to the distinction drawn in the second section of this decision between "direct" and "indirect" discrimination, this question may be further refined. First, would the act of giving preference to "import" candidates amount to an act of direct discrimination? Second, if this conduct did not amount to direct discrimination, would it amount to indirect discrimination on the theory that it unintentionally has the consequence of placing Canadian candidates for quarterback position at a disadvantage. The first question asks whether the "import" versus "non-import" distinction is intended to distinguish, in reality, between two groups of players identified by their nationality or place of origin. The second question assumes that a preference for "imports" does not amount to direct discrimination and asks whether it might nonetheless offend the Code as an instance of the type of discrimination struck down in the United States by the line of authority commencing with Griggs v. Duke Power Company, discussed above in Section II of this decision.

With respect to the question of direct discrimination, I have indicated above that the distinction between "imports" and "non-imports" appears to be rather artfully designed to affect a distinction between

players of Canadian and American origin. The Rule does, of course, rest primarily on a distinction in terms of the place where an individual played football prior to the age of seventeen. As suggested above, however, this seems a transparent device to affect a distinction based, in reality, on national origin. Presumably, the candidates for positions in the CFL will almost invariably have begun to play football prior to the age of seventeen. Americans and Canadians will, almost invariably, play football prior to the age of seventeen in their country of origin. Americans who wish to seek "non-import" status could not do so either by becoming Canadian citizens or, indeed, by playing football after the age of seventeen at a Canadian high school or by spending their college years at a Canadian university. Canadians, on the other hand, would not lose their "non-import" status by attending an American college and receiving the alleged benefits of American football training. Indeed, as indicated above, even if a Canadian were to play in the United States prior to the age of seventeen, he would be saved from being converted to "import" status as long as he did not spend more than four years in the United States prior to the age of twenty-one.

It is true that the possibility exists that there could be players who are "imports" and are not American either by citizenship or by place of origin as well as "non-imports" who are not Canadian. The personal history of a particular American or Canadian may be such as to put him in the opposite category to the rest of his countrymen. Further, there may be CFL recruits who are neither Canadian nor American by either citizenship or place of origin. Indeed, there was some rather vague evidence led at the Inquiry to suggest that this had occurred in one or

two instances. It was Mr. Whiteside's submission, however, that the possibility of such occurrences was enough to lift the "import"/"non-import" distinction outside the prohibitions of the Code. I do not, however, find this argument at all persuasive. The conclusion is inescapable, in my view, that the CFL and its member clubs have designed a scheme which has as its purpose the limiting of the number of players of American origin who can be placed on club rosters. The Ontario Human Rights Code is not, in my view, a statute which should, like a taxing statute, be narrowly construed even in favour of those who wish to frustrate the prupose of the legislation by "sailing close to the wind". As I have indicated earlier in this decision, the Code seems especially to require "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

I am confirmed in this view by a consideration of comments made by Chief Justice MacKeigan in the decision of the Nova Scotia Court of Appeal in Beattie et al v. Governors of Acadia University et al (1976), 72 D.L.R. (3d) 718 at page 720. In that case, a complaint had been brought against Acadia University by American citizens who were students at Acadia University and who maintained that they were barred from playing on the Acadia University basketball team because of a rule limiting the number of non-resident players who could be placed on the roster of each university team. The rule was one which had been imposed by the Canadian Intercollegiate Athletic Union for the purpose, as stated in the evidence, of maintaining well-balanced Canadian teams and promoting the training of basketball players in Canada. The rule provided that no more than three players on a team's roster could have received their previous basketball

training outside Canada. The Nova Scotia Court held that the placement of players on a university basketball team was not an area of activity covered by the Nova Scotia Human Rights Act. Accordingly, it was unnecessary for the Court to reach a conclusion as to whether the application of the rule would amount to a discriminatory act. Chief Justice MacKeigan did, however, express his views on this matter in the following terms:

> If I had to decide the issue, I would be inclined to think that the true purpose and affect of the rule, namely, to reduce the number of American basketball players in Canada, cannot be disguised by the argument that the rule might stop some rare Cuban or Canadian but United States-trained, student from also playing on a Canadian basketball team.

Similarly, I am persuaded that the CFL distinction between "imports" and "non-imports" has, as its true purpose and effect, the drawing of a distinction between players of American origin and those who are of Canadian origin. Accordingly, it is my view that if a coach, acting on the basis of a perceived incentive to do so under the Designated Import Rule were to prefer "import" candidates for the quarterback position to "non-import" candidates, this would be to give a preference to individuals of American origin and would amount to a discriminatory act under the Ontario Human Rights Code.

Further, it is my view that the giving of a preference to an "import" player would, in any event, amount to "indirect" discrimination and thus would amount to a breach of the provisions of the Code. If one assumes, for the sake of argument, that the definition of "import" is not such as to render it a basis for an allegation of direct discrimination, it is evident that a practice of giving preference to "import" candidates would

have the consequence of erecting a barrier against Canadian candidates for the position. Even though obstensibly a "neutral" criterion, the giving of preference to "imports" would deprive Canadian candidates of that equality of opportunity which is secure to them by the Code.

There is nothing in the evidence led which would suggest that the defence of "business necessity" could be established in response to an allegation of "indirect discrimination". The Hamilton Club did not attempt to establish in its evidence that Canadian quarterback candidates could not conceiveably be the most attractive candidates for the position. Nor did they suggest that it was inconvenient or impractical to attempt to fairly assess Canadian candidates. There is no evidence in the record to suggest that the fair recruitment and assessment of the Canadian quarterbacks is, for any reason, an unattainable or impractical objective.

In sum, I reach the following conclusions with respect to the operation of the Designated Import Rule:

1. The Rule does not, in itself, offer a rational basis for preferring American or "import" players to Canadian candidates for the quarterback position.
2. If, notwithstanding the foregoing, a head coach or general manager were to perceive that the Rule did offer an incentive for preferring import candidates, and act on this basis in reaching an employment decision, this would amount to a contravention of the Code as an act of "direct discrimination".
3. In the alternative, such conduct would amount to "indirect discrimination" and would amount to a contravention of the Code on the basis of the

analysis offered by the Griggs v. Duke Power Company line of authority.

V. The Complainant

The complainant, Jamie Bone, has enjoyed considerable success as a quarterback for the football team of the University of Western Ontario in recent years. Evidence led at the Inquiry offered support for Mr. Sopinka's submission that Mr. Bone's performance in recent years entitled him to be ranked as the best quarterback in the Canadian college system and indeed, that he might be ranked as one of the best quarterbacks to play in the Canadian college football system in the last several years.

Born in Halifax, Nova Scotia in 1956, Bone first began to play football in a serious way while attending high school in that city. He professes to have formulated the ambition of playing as a professional football quarterback at the age of fifteen years. His subsequent career suggests that he has devoted much time and energy to the pursuit of that objective.

After completing high school in the spring of 1974, Mr. Bone attended Acadia University. In the fall of his freshman year at Acadia, Mr. Bone played as the starting quarterback for the Acadia football team. In 1975, having formed the impression that he might benefit from exposure to the coaching staff at the University of Western Ontario and to the competition in the Ontario college football league, Bone moved to the University of Western Ontario and ultimately spent four academic years there, beginning in 1974-75 and completing his career in 1978-79. In the spring of 1978, Mr. Bone was awarded the B.A. degree. In 1979, he was awarded the B.Ed.

In each of his four years at U.W.O., Bone played first string quarterback for the U.W.O. football team. Although U.W.O. did not have a particularly good season during Bone's first year as quarterback, they came to dominate the competition amongst the Canadian colleges in the next two seasons. In both 1976 and 1977, the U.W.O. won the national college championship. In both years, Bone was the leading passer in the Canadian Inter-Collegiate Athletic Union or CICAU. In the winning game at the national championship at the CICAU College Bowl in 1977, Bone tied or surpassed a number of records for performance by quarterback in a College Bowl game.

Jamie Bone's first formal contact with the CFL occurred in the spring of 1977 at the time of the College Draft. In order to ensure an orderly recruitment by CFL member Clubs of players from the Canadian college system, the Clubs engage in a highly structured selection of players from the college system in accord with rules set out in section 6 of the CFL By-Laws. In the 1977 Draft, Bone was one of the draft choices of the Winnipeg Blue Bombers Football Club. The effect of this was that the Winnipeg Club had a first claim on Bone's services if he were to play in CFL. In the event, however, Bone decided to return to U.W.O. in the fall of 1977 to complete his B.A. degree. In the spring of 1978, the Winnipeg Club traded its rights to Bone's services to the Hamilton Club and in May and June of that year, Bone attended the Hamilton football camp and tried out for the Tiger-Cat team. Bone was released by the Hamilton Club on or about June 15th, 1978, shortly after the Hamilton team's first pre-season exhibition game. Mr. Bone was not subsequently contacted by any other CFL Club and

ultimately, he decided to return to Western to pursue a course of studies leading to the B.Ed. degree and, of course, to play another season of football.

Although the U.W.O. team did not, in the fall of 1978, match its sparkling success in previous seasons, Bone continued to excel at the quarterback position. The U.W.O. team was defeated by Sir Wilfrid Laurier University for the Championship of the Ontario University Athletic Association (West) Conference. Bone was awarded a number of distinctions for his performance during the season. Rather than list them, they may be conveniently summarized by indicating that it appeared to be the generally shared opinion of the college coaches that he was not only the most outstanding quarterback in the country but, as well, the most valuable player in the Canadian college football. All of the Canadian college coaches who testified at this Inquiry - Frank Cosentino of York University, Ron Murphy of the University of Toronto and Darwin Semotiuk of the University of Western Ontario - agreed that Bone's talents as a quarterback were extraordinary. Coach Semotiuk, who had played Canadian college football for four years and coached for a further eight years, rated Bone as the best Canadian college quarterback he had ever seen.

Although there is very little opportunity for direct competition between Canadian college football players and American college teams, Mr. Bone did participate in two "Can-Am Bowl" games in January of 1977 and January of 1978 in which the best Canadian college players, as selected by the CICAU coaches, play against a team made up of American college football players. Although the American team is by no means an "all star" team, the team is made up for the most part of players

from the first rank of American college teams (the so-called "tier-1" American teams). More particularly, the American team has fielded top ranking college quarterbacks for these games. Although Mr. Bone was not the starting quarterback for the Canadian team in the 1977 game and therefore did not participate extensively, he was selected as the starting quarterback for the 1978 game and led the Canadian offense for approximately three quarters of the game. Coach Semotiuk, who was a member of the Canadian coaching staff for these games, assessed Bone's performance in the 1978 game as being comparable to that of the American team quarterbacks. It must be said, however, that the Can-Am Bowl may provide only a limited opportunity to make an assessment of this kind. The game is played under modified rules which need not be described here and which may have the effect of reducing the extent to which it is a fair test of a quarterback's abilities.

Subsequent to his release by the Hamilton Club in June of 1978, Mr. Bone had not been further contacted by any other CFL team. At the present time, he is unemployed.

VI. The Events in Dispute

The substance of Mr. Bone's complaint of discriminatory treatment derives from his experience in negotiating with the Hamilton Club during the spring of 1978 and from what he views as the unfair treatment he received at the Club's training camp during the period from May 31st to June 14th, 1978. In essence, Bone complains that he was not considered to be a serious candidate for the quarterback position and that he was not given a fair chance to demonstrate his abilities at the camp. As indicated above, he alleges that the reasons for this unfair treatment are largely, if not wholly, attributable to the fact that he is a Canadian.

Although, as will be seen, a number of the incidents on which Mr. Bone relies as evidence for this perception of unfair conduct may appear either trivial or ambiguous in nature, they are, for the most part, at least consistent with the view he has taken of them.

After being traded to the Hamilton Club in the spring of 1978, Mr. Bone was contacted by Mr. Bob Shaw who enquired as to his feelings about this trade. Bone responded positively and indicated that he would be represented in his negotiations with the Club by a Toronto lawyer, Mr. Alan Eagleson. From that point until May 31st, Bone had no further direct contact with Mr. Shaw. On May 3, 1978, Shaw wrote a letter to Eagleson offering Bone a 1978 contract for a base salary of $14,000 with a number of additional bonuses of one kind or another which might become payable during the season. At the time this letter arrived, Mr. Eagleson was in Europe. Upon his return in the middle of May, however, Mr. Eagleson attempted to arrange a meeting with Mr. Shaw to discuss the matter. Two initiatives of this kind were unsuccessful but Shaw ultimately agreed to meet with Eagleson and Bone on Tuesday, May 30, 1978 at Brock University in St. Catharines, Ontario, the location of the 1978 Hamilton training camp.

Upon their arrival in St. Catharines, Bone and Eagleson were surprised to learn that the training camp had already been in session for a few days. In the negotiations, Shaw was unwilling to alter his May 3rd offer. Further, Shaw indicated that two of the quarterbacks in camp were performing very well and that Bone, having missed a few days of training camp, ought not waste any time in signing an agreement with the Club. Further, Shaw is alleged to have indicated that if the offer

was not acceptable, he would be prepared to make Bone available for trade to another Club, though he doubted that any other team would want to purchase the rights to Bone as the other teams would by this time have their rosters pretty well set.

Bone further alleges (evidence p. 129) that during this conversation Shaw indicated that he had made a proposal to a meeting of the general managers of the CFL to amend the CFL roster rules so as to add an additional non-import and an additional import to each Club's roster. Shaw is said to have indicated that the Hamilton Club had been considering Bone as an attractive candidate for the extra non-import in the expectation that "if the designated import rule changed in a couple of years, . . . they would then have an experienced Canadian quarterback and they would then be set - they would be ahead of everybody else, in that respect." That proposal had, however, been defeated.

Shaw's remarks were interpreted by Bone as an invitation to infer that he (Bone) was not considered a very serious prospect for the team and that Shaw was rather indifferent as to whether or not he accepted the $14,000 offer. After reviewing the matter with Eagleson during the return trip to Toronto, Bone resolved to accept the Hamilton offer. He returned to St. Catharines the next day, Wednesday, May 31st, in order to attend the training camp. Bone attended his first practice on the following day and attended each team practice for the next two weeks leading up to the first exhibition game on June 14th.

The burden of Bone's concerns with respect to the treatment he received at the training camp was that the Head Coach, Tom Dimitroff, appeared to not have any serious interest in Bone as a candidate for

the quarterback position and further, that he did not provide Bone with an adequate opportunity to demonstrate his skill.

In his evidence, Bone offered a number of illustrations of what he viewed as Dimitroff's attitude towards him. First, Bone has alleged that the other four quarterback candidates, all of whom were American, were consistently allowed a much greater opportunity to display their skills through the running of plays in the practice sessions. In particular, it was Bone's evidence that the rotation system under which the quarterbacks were permitted to run plays frequently operated in such a way that his turn in the rotation would not materialise. He summed up the situation by suggesting that the two favoured candidates for the position, Mr. Jones and Mr. Shuman, ran as many plays in two days as Bone was permitted to run during the entire two week period. By the time of the exhibition game on June 14th, two of the American candidates had been released. Yet, notwithstanding the fact that Bone was now one of only three candidates for the position, he did not play in the exhibition game (even though he had been dressed for the game) and was released the following day. Particularly revealing, in Bone's view, was the fact that on June 11th, at a practice session to which the public is invited - the so-called "Picture Day" - Bone was asked to sit out approximately one half of the practice, even though he appeared to be performing quite well and in spite of the fact (or in Bone's view, because of the fact) that his performance was obtaining an enthusiastic response from the audience.

Bone raised this problem of inequality of opportunity with Mr. Shaw at an early point in the training camp. Shaw is alleged to

have replied that "It takes a helluva lot of guts for a coach to play a Canadian quarterback." (evidence, p. 152). Needless to say, Bone views this remark as consistent with his perception of discriminatory treatment.

There were other matters as well. Bone felt that Coach Dimitroff was harsh to the point of being unfair in his criticism of his performance, and rather generous in his treatment of the American candidates. As one example of this, Bone recounted an incident in which he was criticized for calling a play which Coach Dimitroff maintained was not one of the plays to be used by the team. Messrs. Jones and Shuman later agreed with Bone, however, that they had all been briefed by Coach Dimitroff on this particular play the previous evening. On another occasion, when Bone committed what Dimitroff considered to be an error, he began to explain the nature of the problem to Bone but, then, to the general amusement of all, gave up in mock exasperation and exclaimed "What's the use?" Similar treatment was not meted out, according to Bone, to the American quarterback candidates.

Further, Bone was perhaps the only candidate in camp who was not issued a "playbook". The "playbook" was alleged by Bone to be necessary equipment for a candidate. The playbook contains diagrams of the team's plays, an account of the rules and regulations followed by the team, and so on. Bone indicated that in his view it was particularly important that quarterback candidates be given a copy of the playbook. When, on May 31st, Bone asked Dimitroff for a copy of the playbook, the straightforward reply was alleged to be "We don't have any." From

that point on Bone borrowed a playbook from a teammate in order to study the plays and this, according to Bone, must have been known to Coach Dimitroff.

Although it may be quite understandable that Bone has perceived these incidents as being consistent with his allegations of discrimination, it must be said that in the absence of more direct evidence of bias, many of these incidents would seem amenable to more innocent explanations. One might assume, for example, that Bone's transition from the college system in which he had been a brilliant performer to the professional environment in which he was a beginner might have led him to be unduly sensitive to Coach Dimitroff's remarks. Much of Dimitroff's conduct could appear to be consistent with the possibility that he had reached a good faith judgment about Bone's prowess as a quarterback. As far as Mr. Shaw's comments are concerned, although it is true that they are at least strongly suggestive of bias, much of his alleged indifference to Bone's candidacy might be considered attributable to skillful bargaining on his part. In any event, it is clear that from the evidence led at the Inquiry the decision to release Bone was clearly that of Coach Dimitroff. Accordingly, it is the evidence of Dimitroff's views and his decision making process which is material to the issues in dispute here.

It must be said, however, that not all of the incidents recounted by Mr. Bone are equally amenable to innocent explanations of this kind. In particular, the alleged remarks of Mr. Shaw that it "takes guts" to play a Canadian quarterback would raise suspicions in the most trusting of observers. Much more importantly, however, direct evidence

of bias was offered, in my view, by the evidence elicited from Mr. Dimitroff on cross-examination by Mr. Sopinka.

In his examination-in-chief, Mr. Dimitroff offered an explanation for his decision to release Bone which was innocent of fault. He maintained that he had made a fair assessment of Bone's abilities and had determined in good faith that it would be in the team's best interest to rely on the more experienced quarterbacks. Further, he indicated that he had not intentionally deprived Bone of a fair opportunity to display his talents. He did not keep track of the number of plays each quarterback ran. He didn't have a playbook for Bone because he did not appreciate that Bone would be attending the camp, and had given his playbook to another player. There were no extra copies and Dimitroff's not unreasonable view was that Bone might have asked for one at a later stage once other players had been released and their playbooks had become available.

I have concluded, however, that Mr. Dimitroff's examination-in-chief did not portray an accurate picture either of his attitude towards Mr. Bone or of the nature and timing of the assessment he made of Mr. Bone's abilities. Although I am satisfied that Mr. Dimitroff's remarks in his testimony in chief were, to some extent, disingenuous, it may also be the case that Mr. Dimitroff is possessed of a sincere belief that he has not acted on the basis of considerations which would place him in contravention of the provisions of the Ontario Human Rights Code. It matters not, however, whether Mr. Dimitroff's attitudes were such as to render him, in some sense, morally culpable. The important point, and I believe this to be firmly established in the evidence, is

that he acted on the basis of a stereotyped view of Canadian football players which led him to prejudge Mr. Bone's abilities before he had an opportunity to assess them and which led him to fail to give Mr. Bone an adequate opportunity to demonstrate his talents at the Hamilton training camp. In so doing, Mr. Dimitroff clearly acted in contravention of Section 4 of the Ontario Human Rights Code.

The evidentiary basis for this finding may be drawn together from a number of propositions established by the responses given by Mr. Dimitroff in cross-examination. First, there can be no doubt that Mr. Bone's fate was sealed, as far as Mr. Dimitroff was concerned, before he arrived at the Hamilton training camp. Mr. Dimitroff offered two explanations for this fact. First, he indicated that he had had a chance to assess Bone's ability as he had seen him play in a film of the 1977 Can-Am Bowl. This suggestion was unconvincing, however, as Dimitroff did not deny, when it was suggested to him by Mr. Sopinka, that Mr. Bone had run only a few plays in that game. Mr. Dimitroff's suggestion that he had had an opportunity to assess Bone's ability prior to the training camp simply cannot be credited. The second explanation offered by Mr. Dimitroff was that he had become disinterested in Bone as a quarterback candidate when he learned, prior to the opening of the camp, that the initiative of the Hamilton Club in seeking an amendment to the rules to permit them an additional non-import player had failed. It was Dimitroff's assumption that if an additional non-import had been permitted, they would choose to make the non-import a quarterback. Dimitroff felt that this would enable the Club to carry a Canadian quarterback in addition to the other two quarterbacks who would be, he

assumed, imports. When it developed that the rule change would not be forthcoming, Dimitroff concedes that he was no longer of the view that Bone could make the team. This conclusion was reached by Dimitroff, it must be emphasized, before he had had any significant opportunity to assess Bone's abilities.

It may be, then, that a number of the incidents recounted by Mr. Bone as evidence of Mr. Dimitroff's lack of interest in his candidacy, are, indeed, to be explained on this basis. Dimitroff's lack of attentiveness and apparent disinclination to afford Bone a full opportunity to demonstrate his skills is quite consistent and, in my view, is to be explained by the fact that Dimitroff had reached an opinion about Bone's merit and his prospects for making the Club's roster before Bone arrived at the training camp.

A second and important thread to be drawn from Mr. Dimitroff's testimony in cross-examination is that the suggestion which he made in his testimony in chief to the effect that his reason for rejecting Bone was that he wanted to hire only quarterbacks with CFL experience is not convincing. On cross-examination, Mr. Dimitroff conceded that he would not have treated an American college star having no Canadian or American professional experience, in the same way that he treated Mr. Bone. The American college star, we are left to assume, would be considered a serious contender for the quarterback position and would be given a fair opportunity to demonstrate his ability. Mr. Bone's problem, it appears, was not necessarily that he was a "rookie" but rather, that he was a certain kind of "rookie".

Thirdly, and most importantly, Mr. Dimitroff's testimony supports the conclusion that he holds a sterotyped view of the capacities of

Canadian football players. It is his view, for example, that the Canadians are slower than the Americans. Thus, Dimitroff confirmed the following incident mentioned by Bone in his evidence. In the course of one of the series of meetings Dimitroff held with the quarterback candidates, Dimitroff indicated that the strategy of a particular play he was discussing was to bring about a situation where there would be a contest between an American and a Canadian player, the assumption being that the American, being faster, would have an advantage over the Canadian. Noticing Bone's presence, Dimitroff affected an apology and remarked, "But face it, Jamie, the imports have all the speed." Dimitroff conceded in cross-examination that as a matter of general strategy, he assummed that positions in which less speed was required, would be filled by Canadian players. Further, with specific reference to quarterbacks, he is of the view that Americans are better than Canadians. Mr. Dimitroff attributes this difference in quality to better training in the American college football system. Further, he suggests that his views are based on an observation of American and Canadian players in the CFL. With respect to these justifications of his stereotyped view, two points must be made. First, there was not sufficient evidence led before this Inquiry to establish that either of these judgments on Mr. Dimitroff's part would be warranted by a dispassionate review of evidence concerning the respective quality of coaching in the United States and Canada or of the respective speed or other abilities of Canadian and American football players. Secondly, it is not in my view relevant to a proper analysis of the application of Section 4 of the Ontario Human Rights Code to this fact situation to determine whether or not these views of Mr. Dimitroff are correct.

Let us assume, for the sake of argument, that Mr. Dimitroff's views of the respective merits of Canadian and American college football coaching are warranted, and assume, further, that his view that the speed and other capacities of American football players are generally superior to those of Canadian players is sound. It would nonetheless remain true that Mr. Dimitroff has reached a generalised conclusion about the merits of the members of one national group as against the merits of another national group. While it might be understandable that Mr. Dimitroff could reach such a conclusion in these circumstances, he would nonetheless act in contravention of the Ontario Human Rights Code if he acted on the basis of these assumptions and refused to judge an individual candidate for employment on the basis of his individual merit rather than his membership in a particular national group. To act in this way contravenes not merely the letter of the Human Rights Code; it contravenes its spirit as well in that it has the effect of denying those equal opportunities to employment which the Code attempts to secure to all individuals regardless of their nationality or national origin.

Similarly, if an employer had in good faith reached the conclusion that members of a particular religious or ethnic group more frequently suffer from undesirable personality traits (such as dishonesty or laziness) which are relevant to an assessment of candidates for the particular job in question, there can be no doubt but that the employer would offend the Code if he prejudged candidates to be dishonest or lazy on the basis that they were members of the particular ethnic or religious group. It is simply not relevant that the

generalization may be one which is reached in good faith or, indeed, on the basis of statistical evidence. So, too, when Mr. Dimitroff concludes, as he apparently has, that American football players are generally better than Canadian football players we need not, for purposes of applying the pertinent provisions of the Ontario Human Rights Code, inquire as to whether the generalization is soundly based in fact. What the Code proscribes is the denial of equal employment opportunity through the evaluation of individual candidates for employment on the basis of such generalizations rather than on an assessment of individual merit.

In sum, then, I find that the evidence led at this Inquiry supports the conclusion that Mr. Dimitroff failed to accord the complainant an adequate opportunity to demonstrate his ability at the 1978 training camp and that this conduct is attributable to the application by Dimitroff of a stereotyped assumption or generalization concerning Canadian football players to Bone with the result that Dimitroff felt that Bone's abilities were not at the requisite standard. It will ultimately be my conclusion that in so doing, Mr. Dimitroff, and the Hamilton Club in turn, dismissed or refused to employ or to continue to employ a person because of nationality or place or origin in contravention of Section 4 of the Ontario Human Rights Code.

I should add, however, that it would not appear to me to be of any assistance to the Hamilton Club or to Mr. Dimitroff to establish that the target group of their discrimination was not one based on nationality but rather one based on some criterion such as "persons who have not received their football training in the United States" or "persons who have not achieved unusual success in American college

football." In an analysis of employment decisions based on criteria on this kind, the decision in Griggs v. Duke Power Company, discussed above, would become very material. Though such a criterion may appear to be "neutral" in intent, it would be discriminatory in its consequences. If the Hamilton Club were to argue that "we don't discriminate against Canadians, we just discriminate against people who aren't American college stars", the answer supplied by the Griggs case is that such a criterion has the effect of denying employment opportunities to Canadian nationals (in as much as only a very insignificant number of Canadians achieve this distinction) and accordingly, application of the criterion must be defended as a "business necessity." Nothing led in evidence before this Inquiry would suggest that the application of such criterion could be defended on the basis of the "business necessity" test. It has not been suggested that American college training or stardom is an essential prerequisite to the ability to play football in the Canadian Football League. Nor, as I have indicated above, was there any suggestion that the duty to make a fair assessment of individual players, regardless of their American experience, imposes such substantial inconvenience or inefficiency as to justify the discriminatory effect of such a criterion.

Mr. Dimitroff's evidence on cross-examination indicates that a second factor was influencial in reaching a conclusion that Bone would not be a serious candidate for the quarterback position. I refer here to the significance, in Dimitroff's view, of the implications of the Designated Import Rule for the appointment of import as opposed to non-import quarterbacks. The evidence indicates that Mr. Dimitroff,

at the material time, was of the view that the Designated Import Rule offered an incentive for the appointment of American quarterbacks and that this perception played a role in his decision to release Bone. In cross-examination, Mr. Dimitroff conceded that in a telephone conversation with Mr. Vic Marcus, a Human Rights Officer, on November 28th, 1978, he had protested to Marcus that the fact that he didn't bring Bone along was not discriminatory but that he was simply taking advantage of a League rule, the Designated Import Rule, "just as all the other Clubs in the CFL did." Mr. Dimitroff further testified that the way in which one would take advantage of the Designated Import Rule would be to appoint two imports to the quarterback position and, he further testified, this is the "prefered option" of the CFL Clubs.

In Section IV of this decision, I have indicated at length the basis for my view that a decision to prefer import candidates over non-import candidates on the basis of some perceived advantage to be derived from the Designated Import Rule would amount to "direct" discrimination and as such, would constitute a contravention of the Code. I find, therefore, that Mr. Dimitroff's reliance on the Designated Import Rule in reaching his decision not to further employ Bone amounts to an additional contravention of the Code. As I have explained in Section IV, this conclusion rests on a finding that the distinction between imports and non-imports is a transparent device for making a distinction which is truely based on considerations of nationality or place of origin. If I am wrong in this, I am satisfied that to act in such a way as to prefer import candidates would constitute "indirect" discrimination within the meaning of the Griggs v. Duke

Power Company line of authority and would, on this basis, constitute a contravention of the Code.

A review of the evidence thus persuades me that two features of the decision making process which led Mr. Dimitroff to fail to provide Mr. Bone with an adequate opportunity to demonstrate his skill at the 1978 Hamilton camp support findings that Mr. Dimitroff and, in turn, the Hamilton Club have acted in contravention of the Code. It is not necessary for me to attempt to reach an opinion as to which, if either of these factors, dominated Mr. Dimitroff's thought processes with respect to Mr. Bone's candidacy. I am satisfied that each factor played a role in the decision. And, as was indicated in Section II of this decision, it is sufficient to ground a finding of contravention if the factors in question were proximate causes of the discriminatory act. The evidence suggests that both of these factors played a causal role of this kind. It would be sufficient, however, if either one had provided part of the basis for Mr. Dimitroff's decisions with respect to Mr. Bone.

Finally, the connection must be drawn between the denial here of a fair opportunity to demonstrate skill and the specific provisions of the Code. Although the denial of opportunity may have the appearance of a refusal to recruit or employ, it is technically a dismissal or refusal to continue to employ inasmuch as Mr. Bone was already under contract when he attended the training camp. It is thus clearly embraced by Section 4(1)(b) of the Code. Further, to the extent that Mr. Dimitroff formed the view that the quarterbacks on the Hamilton Club should be imports, the Club established an employment category

that operated to exclude Canadians from employment within the meaning of Section 4(1)(e). It may be thought that the Hamilton Club was under no statutory obligation to invite Mr. Bone to the training camp in the first place for a try-out and that accordingly, no statutory duty is imposed on the Club by the Code to fairly assess his abilities. Invitation to camp, however, was made in this case and indeed, pursuant to CFL rules, Mr. Bone was obliged to enter into a contract of employment with the Hamilton Club before participating in the sessions at the training camp. Once this has occurred, in my view, an obligation falls on the Club to abide by the provisions of Section 4 which relate to decisions such as the decision to dismiss an existing employee. Discrimination in the recruitment process (here the process leading up to the signing of a contract of employment), would be covered by Section 4(1)(a). Neither the Commission nor the complainant have submitted, however, that the Hamilton Club acted in breach of that sub-section in its recruitment activities with respect to Mr. Bone.

VII. The Order - Analysis

Having reached the conclusion that a contravention of the Code has occurred on the facts of this case, it then becomes necessary to consider the possibility of fashioning an order which will require the Hamilton Club to engage in conduct which will adequately remedy its default. The powers conferred on the Board in this respect are cast in very general terms by the Code. Section 14(c) confers upon the Board a power to "order any party who has contravened this Act to do any act or thing that, in the opinion of the board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor."

The substance of the contravention in this case is that the Hamilton Club denied Mr. Bone a fair opportunity to obtain employment with the Club during the 1978 regular CFL season. In my view, two different forms of redress must be considered in an attempt to effect a remedy which is appropriate to the circumstances of this case. First, Mr. Bone has been deprived of an opportunity to earn income during the 1978 football season and an appropriate measure of compensation for that loss must be calculated. Second, it is appropriate to make an order which will require the Hamilton Club to afford Mr. Bone an opportunity to adequately demonstrate his abilities as a candidate for the quarterback position and seek employment with the Club. Both of these remedies, however, raise points of some difficulty which require careful consideration.

With respect to the matter of compensation, Mr. Sopinka has argued that the appropriate measure of relief is $14,000, the remuneration which Mr. Bone would have obtained under his contract of employment with the Hamilton Club if he had completed the 1978 season as a member of the Club's roster. The difficulty I find with this suggestion is that the evidence led at the Inquiry

does not establish that if Mr. Bone had been given a reasonable opportunity to demonstrate his abilities, he would have been successful in obtaining a place on the Hamilton roster for the 1978 season. In essence, Mr. Bone has been deprived of an opportunity to enter a contest for the quarterback position on fair terms. Is it appropriate in these circumstances, then, to make an award premised on the assumption that Mr. Bone would have been successful in that contest? This question does not admit of an easy answer.

In favour of the full measure of relief suggested by Mr. Sopinka, it might be argued that complainants in employment discrimination cases of this kind will inevitably have some difficulty in establishing that they would have obtained employment if they had been considered on the basis of individual merit. Hence, it may be appropriate to make an assumption in their favour, subject to rebuttal by the employer if it can be established that the successful candidate for the position was more qualified than the complainant. An approach along these lines has been adopted in some American cases. In Cooper v. Allen (1972), 467 F. (2d) 836 (C.A., 5th Cir.), for example, the complainant brought a complaint under Title VII of the Civil Rights Act of 1964, alleging that he had been discriminated against in his application for a position as a "golf pro" with an Atlanta municipal golf course. The basis for this allegation was the plaintiff and other applicants for the job had been required to take a test which had a discriminatory effect. The complaint was upheld. The important point for present purposes is that the Circuit Court of Appeal ordered that the complainant should be awarded back pay unless the municipality could establish by clear evidence that the person actually hired for the position was on the whole better qualified for the job when measured against the other qualifications it had stipulated for the position.

In my view, however, fact situations such as that reviewed in Cooper are significantly different from that in issue here. In Cooper, the decision to hire was based on a review of the canadidate's "qualifications." This would consist of an assessment of prior experience, training, etc., and might involve an interview to solicit further information or provide an opportunity to assess communicative skills, etc. In the context of hiring decisions of this kind, it does not appear to me to be unreasonable to impose a burden on the employer to establish that an assessment of the "qualifications" of the successful candidate indicates that the complainant would not have been hired for the position. The information which would form the basis of a comparative assessment of the complainant and the successful candidate is readily available at the time of hearing the complaint.

In the rather unusual circumstances of the present case, however, "qualifications" in this sense serve to perform only the limited function of screening entry of candidates into the contest for employment which occurs during the training camp and indeed, continues in a sense throughout the regular season of play. The decision to employ is ultimately not based on one's qualifications, but rather on one's performance during training camp. Continued employment rests on sustaining a level of achievement which cannot be exceeded by other candidates for the position who might become available to the Club during the season. The Cooper line of analysis may well be appropriate in the context of the general run of hiring decisions in which the decision to employ will be based on information available at the initial point of hiring. I find it to be inappropriate, however, where the complainant has been deprived of an opportunity to enter into an extensive period of competition under the direct supervision of the employer in the hope that the candidate might ultimately be chosen as the most attractive of those in

competition for the position.

Having reached this conclusion, it does not follow that the complainant is not entitled to any compensation for this loss of opportunity. On the contrary, it is my view that an attempt should be made to calculate, in monetary terms, an appropriate measure of loss represented by this deprivation. Analagous problems of loss of opportunity have arisen both in the law of contract and in the law of torts. In these contexts, the courts have adopted the solution of attempting to calculate the probability of the loss occurring and then allocating to the plaintiff an equivalent portion of the amount which would have been received if the opportunity had been successfully exploited. See, for example, Chaplin v. Hicks [1911] 2 K.B. 786; Barry v. British Transport Commission [1954] 1 Lloyd's Rep. 372. And see, generally, Ogus, The Law of Damages, (1973) pp. 83-84 and 296; McGregor, The Law of Damages (13th ed., 1972) pp. 181-194.

On what basis can such a calculation be based on the facts of the present case? The evidence led at this Inquiry indicates that there were only two openings for quarterbacks on the Hamilton Club's 1978 roster. Ultimately, the competitors for these positions were reduced during the 1978 camp to three, Mr. Jones, Mr. Shuman and Mr. Bone. I am satisfied on the evidence that one of these positions would have been filled, in any event, by Mr. Jones. The evidence of two observers at the training camp, Mr. Iaboni, a journalist, and Mr. Rozalowski, a fellow recruit and friend of the complainant, confirms the evidence of Mr. Dimitroff that Jones' capacities were such that he would have ultimately been preferred to Bone for selection as the first string quarterback. I am not satisfied, however, on the basis of the evidence that it is clear that Mr. Shuman's abilities were such that he would inevitably have been preferred

for the second quarterback position. Nor am I satisfied, although there was some evidence to this effect from Mr. Rozalowski, that Bone was clearly the preferable choice over Shuman. For these reasons, I assess the probability of Bone being selected for the second quarterback position as being one chance in two, and accordingly order that the Hamilton Club pay the complainant 50% of the $14,000 salary which he could have earned during the 1978 season.

Mr. Sopinka has further argued before this Board that an award should be made of general damages as compensation for injuries sustained by the plaintiff in the form of injured feelings, loss of dignity and injury to reputation. Before turning to consider whether such injuries have occurred in this case, it must be asked whether an award of this kind is permitted by Section 14C(b) of the Ontario Human Rights Code. On behalf of the Hamilton Club, Mr. Whiteside has argued that no such award is permissible. In support of this view he relies by analogy on principles of the law of contract said to be manifest in cases dealing with claims for wrongful dismissal. Cases such as Addis v. Gramophone Co. [1909] A.C. 488, for example, appear to suggest that damages for injured feelings or mental distress are not recoverable in wrongful dismissal claims. So too, Mr. Whiteside argues, such damages ought not to be awarded under section 14 of the Ontario Human Rights Code.

A number of points may be taken in response to Mr. Whiteside's submissions. First, it is not my view that the contractual principles dealing with wrongful dismissal are dispositive of issues relating to the determination of compensation questions under the provisions of the Human Rights Code. Contract cases, such as Addis v. Gramophone Co. do not deny that injuries of this kind have occurred. They suggest, rather, that such injuries are not compensable in a contract claim. The distinction between the existence of the injury and its compensability is

an important one for present purposes. If an injury has in fact occurred, it is my view that it is potentially compensable under Section 14 of the Code whether or not such damages are traditionally allowed in claims for breach of contract. Secondly, it should be pointed out that the law on wrongful dismissal may have evolved, to some extent, since the decision in Addis v. Gramophone Co. to permit awards of damages for injury to feelings or one's sense of dignity resulting from a breach of an employment contract. In the recent case of Cox v. Philips Industries Ltd. [1976] 3 All E.R. 161 (Q.B.) an award of damages was made for frustration and distress resulting from a demotion rendered by an employer in breach of its obligations under the contract of employment in question. See also, Tippett et al. v. International Typographical Union, Local 226 et al. (1976), 71 D.L.R. (3d) 146 (B.C.S.C.) (damage awarded for lost wages, loss of reputation and mental distress for wrongful expulsion from membership in a trade union). Cases of this kind appear to be merely single instances of more general evolution of the principles of the law of contract in favour of awarding damages for injuries to feelings resulting from breach of contract. The English, Canadian and Australian authorities are conveniently summarized in Clarke, "Damages in Contract for Mental Distress", (1978) 52 Australian L.J. 626. Thirdly with respect to injury to reputation, contract law has long recognised that such injuries may be compensable where the contract of employment is one in which such an injury is forseeable, though it may be that such damages are properly limited, in contract cases, to pecuniary loss which can be causally linked to the reputation injury. See, generally, McGregor, The Law of Damages (13th Ed., 1972, pp. 602-606). It appears arguable that employment contracts of professional athletes may be subject to this rule.

Fortunately, I am spared the difficult task of attempting to determine with precision the current state of the law of contract with respect to the

compensability of injuries to feelings and reputation in the context of wrongful dismissal cases. The important point for present purposes is that the principles of the law of contract do not, in my view, govern in cases of compensation for injuries sustained ordered pursuant to Section 14 of the Ontario Human Rights Code. It is my view that general damages can be awarded under Section 14 if it can be established that injuries of this kind have, in fact, been sustained by the co: plainant. I see no reason to conclude that the phrase "any injury" in Section 14C(d) should be interpreted so as to exclude injuries to feelings or reputation. Some indirect support for this conclusion can be drawn from the equivalent provisions of the Canadian Human Rights Code, S.C. 1976 - 77, C. 33, which expressly permit, in Section 41(3), compensation of this kind in an amount not to exceed $5,000.

Is there, then, evidence of injuries of this kind sustained by Mr. Bone which can properly be made the subject of an award of general damages? It is my view that such injuries did occur. The circumstances of the discriminatory act in issue here could not have been better designed to induce feelings of frustration and distress. The try-out of Mr. Bone at the 1978 Hamilton training camp appears to have been an empty charade. Mr. Bone discerned, accurately in my view, at an early stage of his experience at the camp that he was the subject of discriminatory attitudes. The experience was a humiliating and disheartening one for Mr. Bone. The predictable and substantial publicity which attended these events could only exaggerate these difficulties.

Further, with respect to the question of injury to reputation, the inevitably public nature of the Hamilton decision to release Bone could not fail to have an impact on Mr. Bone's professional reputation, conveying, as it did, a tacit judgment that Mr. Bone's abilities were not of the required standard. Although

it is no doubt impossible to determine with any precision the impact of this incident on Mr. Bone's ability to market his skills in the CFL, it is not irrelevant to note, in my view, that Mr. Bone,apparently the best Canadian college quarterback of recent years, has not been offered a try-out by any other CFL Club in the twelve months following his release by the Hamilton Club.

Further, it is in my view relevant in deciding whether to exercise a discretion to award compensation for injuries of this kind to observe that the discriminatory acts in question were "direct" rather than "indirect." This is not a case of an employer establishing in good faith what was thought to be a neutral criterion of employment which unwittingly had a discriminatory effect. Whether one premises the finding of contravention on the basis of discriminatory attitudes or on the basis of the "application" of the Designated Import Rule, it is my view that the discrimination was patently and knowingly premised on considerations of nationality or place of origin.

For these reasons, I conclude that an award of general damages is an appropriate measure to effect compensation for injuries resulting from the conduct of the Hamilton Club. Given the absence of direct evidence of substantial pecuniary loss resulting from these injuries, I would assess $3,000 as an appropriate level of compensation for these injuries.

Before leaving the question of compensation, two further points must be considered. First, Mr. Whiteside suggested in argument that Mr. Bone should be held subject to a duty to mitigate his loss by seeking employment elsewhere and that any award to be made by this Board should be reduced in recognition of the fact that Mr. Bone did not seek alternate employment but rather returned to University in the fall of 1978. I am not persuaded, however, that any duty to mitigate which should be imposed on Mr. Bone would extend to the obtaining

of non-athletic employment in order to supply the income which he lost through failure to obtain remuneration under his contract of employment with the Hamilton Club. See, generally, Treitel, The Law of Contract (4th ed., 1975) pp. 652-653. In any event, it is my view that Mr. Bone's action in returning to college to seek further education and to enjoy another successful year of college football was a reasonable step to take from the perspective of maximizing his prospects of both a successful football career and successful employment in an alternate field.

Finally, it may be asked whether some compensation should be awarded with respect to the current football season. Mr. Bone's complaint is dated October 18, 1978, and it is apparent that efforts to resolve this matter have occupied the intervening months up to the appointment of this Board of Inquiry. Can it be argued that Mr. Bone has sustained the loss of a further opportunity to seek employment as a CFL quarterback with the Hamilton Club as a result of what might be viewed as a "continuing breach" of the Ontario Human Rights Code? On this point, it may simply be observed that there was no evidence led at the Inquiry which suggests that the lengthy gestation period of this matter results from dilatory conduct on the part of the Hamilton Club or from an unwillingness of the Club to take appropriate steps to remedy the injuries occasioned by its conduct. In the absence of such evidence, an award of compensation with respect to the current football season would, in my view, be unwarranted.

I turn now to consider the question of whether the Hamilton Club should be ordered to afford Mr. Bone an additional opportunity to demonstrate his abilities as a candidate for one of the quarterback positions on the Club

roster. Mr. Sopinka has suggested that the Hamilton Club should be required to invite Mr. Bone forthwith to a try-out with the Club. Further, in order to make this opportunity a meaningful one, Mr. Sopinka argues that it should last for a period of one month and that the Hamilton Club should be required to refrain from designating two import quarterbacks under the Designated Import Rule. Only in this way, he suggests, can a try-out free of discrimination be secured for Mr. Bone.

Although I am persuaded that it is appropriate to make an order which will ensure that Mr. Bone is given a fair and adequate opportunity to try out for the Hamilton team, there are serious difficulties with the proposal that Mr. Sopinka has put forward. First, for the reasons I have indicated previously in this decision, I am not persuaded that the necessary effect of the Designated Import Rule is to discriminate against Canadian candidates for the quarterback position. Accordingly, it is inappropriate to attach a rider of the kind proposed to any order requiring the Hamilton Club to invite Mr. Bone for try-out. In order to ensure that any decision made with respect to Mr. Bone is not based on a misapprehension of the significance of the Rule, however, it would be appropriate to order the Hamilton Club to instruct its coaching staff that in the event that Mr. Bone proves to be superior to other candidates for the position, Mr. Bone should be placed on the roster, notwithstanding the fact that this may result in the Club carrying only fourteen import players on its roster or in carrying a fifteenth subject to the substitution rule. Further, as a general matter, instructions to this effect should be given to all new members of the Hamilton Club coaching staff each year hereafter

for as long as the Designated Import Rule, in its current form, is in effect in an attempt to ensure that Canadian candidates for the quarterback position, other than the complainant, will not suffer discriminatory treatment on the basis of any perceived advantage to designating two import quarterbacks -- under the Rule. An order to this effect will be made.

Further difficulties arise with respect to the length of the trial period suggested by Mr. Sopinka. The CFL rules, also previously discussed in this decision, stipulate that during the season, players who are not on the roster may be invited to attend practice sessions only for a five-day period. To extend this period would require the Hamilton Club either to release one of the existing members of its roster or to expose itself to the minimum fine of $500 per day stipulated in paragraph 18 of Section 8 of the CFL by-laws. I have concluded that it is not appropriate to impose either of these alternatives on the Hamilton Club in an attempt to fashion an order which will secure a fair trial for Mr. Bone.

With respect to the first alternative - release of an existing member of the roster - I think it would be unjust to compound the injury done to Mr. Bone by forcing the release of and consequent loss of employment to an existing member of the roster. The affected individual would, of course, not be in any way responsible for the injuries sustained by Mr. Bone. It would be a harsh order which would impose a penalty of this kind on an innocent party, simply in order to provide a try-out for Mr. Bone.

With respect to the second alternative - the payment of fines - the making of an order which would expose the Hamilton Club to such liabilities is an unwarranted sanction in the absence of evidence that what I have referred to above as the long gestation period of this complaint results from dilatory conduct on the part of the Club.

In order to minimise the injuries sustained by the complainant through the loss of opportunity which has occurred in this case, it is appropriate, however, to order that the Hamilton Club afford the complainant an opportunity to demonstrate his skills in the hope of securing a place on the roster during the current football season. The loss of a season's experience in the CFL would be a significant matter for Mr. Bone and should be avoided if he is, indeed, of such ability that an unbiased assessment would place him on the Hamilton Club's roster. Accordingly, the Hamilton Club is ordered to invite Mr. Bone to participate in a five-day trial with the Club as soon as is reasonably practicable. Further, inasmuch as I am persuaded that the five-day trial permitted by the Rules does not represent a meaningful opportunity for Mr. Bone to demonstrate his skills, the Hamilton Club is further ordered to seek a release from the League of the sanctions which might otherwise be imposed under paragraph 18 of Section 8 so as to permit Mr. Bone to attend practice sessions of the Club (without forcing the release of another player) for a period of one month and to permit Mr. Bone to try out for the Club during such period as is permitted under these conditions by the CFL.

If Mr. Bone is successful in being selected for a position on the regular roster, the Hamilton Club must be prepared to enter into a contract of employment with Mr. Bone which would secure to him as much remuneration as he would have obtained for this season if the Hamilton Club had exercised its option to renew its June 2, 1978 agreement with Mr. Bone, provided that it shall not be permitted to exercise its option under paragraph 15(1)of that agreement to reduce the amount of remuneration payable to Mr. Bone under paragraph 3 of that agreement. As is provided in paragraph 3 of the agreement, Mr. Bone's entitlement to remuneration would depend on the number of regularly scheduled conference games occurring

during the term of the contract subsequent to the date of renewal.

Even if a one month trial is made available to Mr. Bone during the current season, however, I am not of the view that it will represent a satisfactory attempt at full compliance with the provisions of the Human Rights Code on the part of the Hamilton Club. The evidence with respect to the 1978 camp suggests that a candidate for the quarterback position making a late start has a much reduced chance of being placed on the roster. Accordingly, it is appropriate to further order that Mr. Bone be invited to the 1980 football camp of the Hamilton Club and be accorded a fair opportunity to demonstrate his skills as a candidate for the quarterback position. In order to attend that camp, Mr. Bone will be required to enter into a contract of employment with the Hamilton Club. That contract should be entered into on the same terms and conditions as the agreement entered into between the parties on June 2, 1978, subject to two provisos. First, the agreement should embody any changes made to the CFL Standard Player Contract effective during the 1980 season. Second, the remuneration payable under paragraph 3 of the agreement should be increased, at a minimum, in an amount which will reflect such increase in the cost of living as occurs during the period from June 1, 1978 to May 1, 1980, the latter date being a date which the evidence led at this Inquiry suggests would be close to the date on which a candidate such as Mr. Bone would normally enter into an agreement with the Club. In order to facilitate a calculation of this cost of living factor by the parties, it is further ordered that the cost of living should be calculated in accordance with any increase during this period in the Consumers Price Index published by Statistics Canada for the City of Hamilton.

With further reference to the calculation of the minimum remuneration term of the 1980 agreement which must be offered to Mr. Bone, it is possible

that a minimum or base salary figure for CFL players is a matter of annual agreement between the CFL and the CFL Players' Association. Although there was no evidence led on this matter at the Inquiry, if this is the case, the cost of living factor indicated above should be added to the base salary for the 1980 season, if it exceeds $14,000, in order to calculate the minimum 1980 salary figure for Mr. Bone.

VIII. The Order

The Hamilton Club is hereby ordered to pay compensation in the following amounts and engage in the following conduct in order to fully comply with the provisions of the Human Rights Code and compensate the complainant for injuries caused as a result of its contravention of the Code:

1. Compensation in the amount of $7,000 is to be paid to the complainant for the loss of a fair opportunity to seek placement on the 1978 Hamilton roster.

2. Compensation in the amount of $3,000 is to be paid to the complainant for injuries to feelings and loss of reputation.

3. The complainant is to be invited, as soon as is reasonably practicable, to participate in a five-day trial with the Club.

4. The Hamilton Club must approach the CFL and/or its Commissioner and seek release from the sanctions which might otherwise be imposed under paragraph 18 of Section 8 of the CFL by-laws in order to extend the trial period stipulated in paragraph 3 above for a period not to exceed one month.

5. The Hamilton Club must invite the complainant to its 1980 training camp and offer to enter into a contract of employment

with the complainant for this purpose which will contain, at a minimum, the same terms and conditions as the June 2, 1978 contract entered into between the parties, subject to any changes in the CFL Standard Player Contract effective for the 1980 CFL season and subject to the revision upward of the provisions of paragraph 3 concerning remuneration so as to reflect any increase in the cost of living occurring during the period from June 1, 1978 to May 1, 1980, this latter factor to be calculated in accordance with any increase in the Consumer Price Index published by Statistics Canada for the City of Hamilton during that period. If the CFL enters into a minimum or base salary figure for CFL players to be applicable during the 1980 season, and if that figure exceeds $14,000, the aforementioned cost of living factor should be added to the minimum or base salary in order to calculate the minimum remuneration term of the 1980 contract to be entered into between the parties.

6. If, during the trial periods stipulated in Paragraphs 3, 4 and 5 above, Mr. Bone proves, in the opinion of the Head Coach of the Hamilton Club to be superior in ability to the incumbents of or candidates for the quarterback position on the Hamilton roster, he shall be offered a position on the roster. In order to ensure that this decision-making process is not complicated by any perceptions that it would be desirable to designate two import quarterbacks under the Designated Import Rule, even though one of them might be less capable than the complainant, the

Hamilton Club shall instruct its coaching staff and, in particular, its Head Coach that the decision is to be based solely on an assessment of the complainant's ability, and that the Club would prefer to either have only fourteen imports on its roster or designate an import who is not a quarterback rather than employ an import quarterback to whom Mr. Bone is superior in ability.

7. If, pursuant to paragraph 6, a decision is made to offer Mr. Bone a position on the Hamilton Club roster during the current season, the Hamilton Club must offer, at a minimum, a contract of employment on the same terms and conditions as he would have obtained if the Hamilton Club had exercised its option to renew its June 2, 1978 agreement with Mr. Bone, provided that:

   - it shall not be permitted to exercise the option secured in paragraph 15(1)of the agreement to reduce the rate of compensation below the amount set forth in paragraph 3 of the agreement, and

   - the remuneration payable under paragraph 3 of the agreement will be payable only for such portion of the season as occurs subsequent to the date of Mr. Bone obtaining a position on the roster.

8. The Hamilton Club shall explain forthwith to its present coaching staff and all new members of the coaching staff upon their appointment for as long as the Designated Import Rules, in their current form, are in effect, that the Designated Import Rule does not offer an incentive for

preferring import quarterbacks to more capable non-import quarterbacks and, more particularly, shall indicate that the Club would prefer to either designate an import who is not a quarterback or have one less import on its roster rather than designate two import quarterbacks under the Designated Import Rules, one of whom is less capable than a non-import candidate for the position.

DATED at Toronto this 16th day of August, 1979.

John D. McCamus